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JOHN F. DAVIS,

No. 1295

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NORTH AMERICAN VAN LINES, INC., *Appellant*

v.

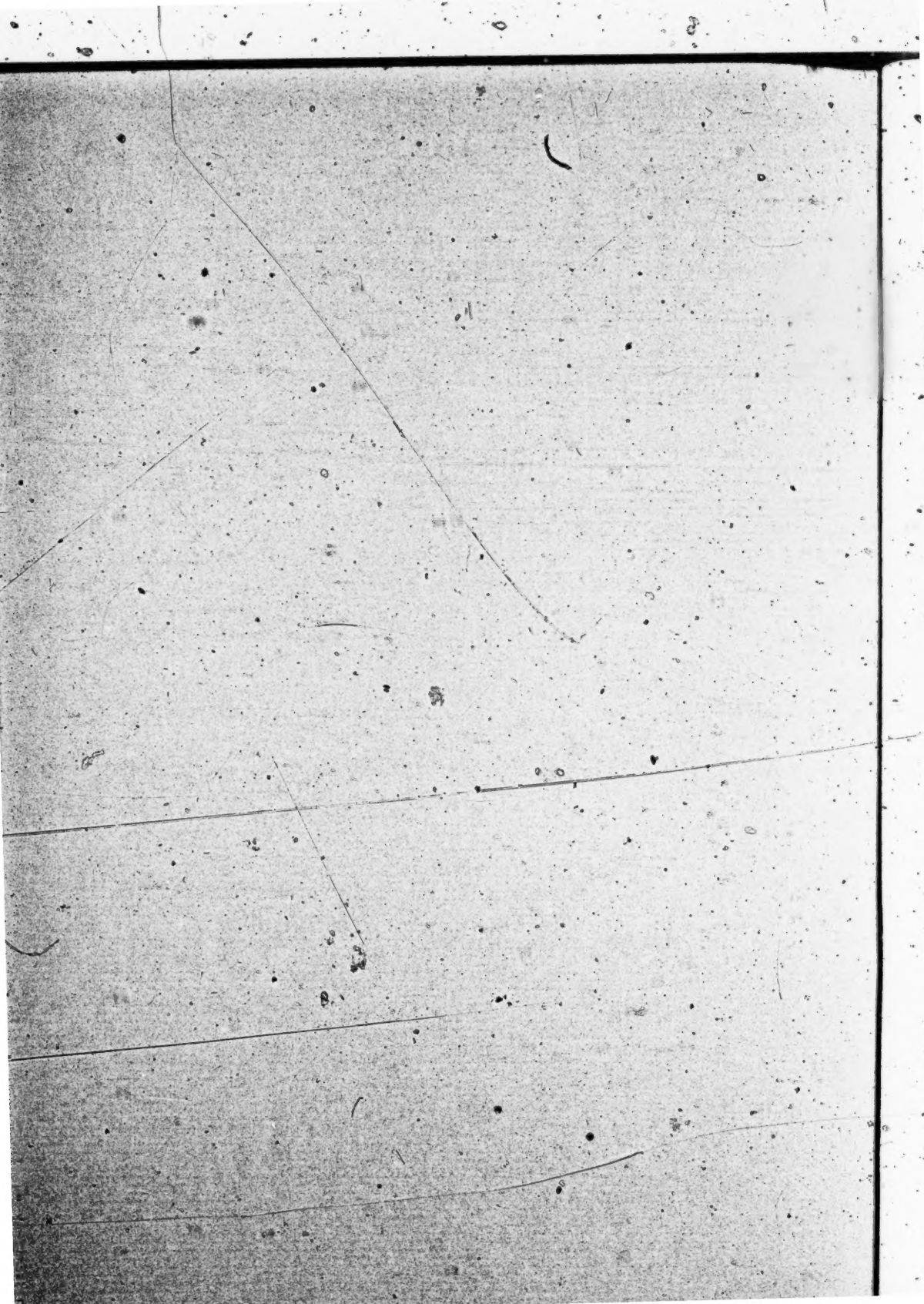
UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, FORT WAYNE DIVISION

JURISDICTIONAL STATEMENT

MARTIN A. WEISSERT
P. O. Box 988
Fort Wayne, Indiana

Attorney for Appellant



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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, FORT WAYNE DIVISION

JURISDICTIONAL STATEMENT

Appellant, North American Van Lines, Inc., appeals from the judgment of a three judge court convened in the United States District Court for the Northern District of Indiana, Fort Wayne Division, upholding an order of the Interstate Commerce Commission which declared that Appellant's motor carrier certificate of public convenience and necessity No. MC-107012 Sub 30 does not authorize

the transportation of cargo from and to Alaska in the so-called "land-sea-land" mode. The certificate, hereafter sometimes referred to as Sub 30, is printed in Appendix A.

OPINIONS BELOW

The order of the Interstate Commerce Commission is printed in Appendix B. The opinion and judgment of the District Court is officially reported at 277 F. Supp. 741, but for the convenience of this Court it is printed in Appendix C. The District Court did not make separate findings of fact and conclusions of law.

JURISDICTION

Appellant commenced this action by a complaint filed in the District Court invoking the jurisdiction of a three judge court pursuant to 28 U.S.C. §§1336, 1398, 2284, and 2325, and 5 U.S.C. §1009. The complaint prayed that the order of the Interstate Commerce Commission be set aside. On December 20, 1967, the District Court, sitting as a panel of three judges, entered its judgment denying the relief sought. Appellant's notice of appeal was filed in the District Court on February 8, 1968.

The jurisdiction of this Court to review by direct appeal the judgment of the three judge District Court is conferred by 28 U.S.C. §1253, and is sustained by the decision of this Court in *St. Louis & O'Fallon Ry. v. United States*, 279 U.S. 461.

STATUTES INVOLVED

Section 203 (a) (10) of the Interstate Commerce Act, 49 U.S.C. §303 (a) (10), provides:

> The term "interstate commerce" means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by

motor vehicle or partly by motor vehicle and partly by rail, express, or water: *Provided*, That to the extent that such transportation in "interstate commerce" between points in Alaska and points in other states is performed within a foreign country, the application of this part shall not include any requirement as to conduct in such foreign country which is in conflict with a requirement of such foreign country, but shall include as a condition to engaging in such operations within the jurisdiction of the United States, the observance, as to the entire service, of the requirements of this part with respect to rates, fares, charges, and practices pertaining to such transportation.

Section 216 (c) of the Interstate Commerce Act, 49 U.S.C. §316 (c), provides:

Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof, as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers. As used in this subsection, the term "common carriers by water" includes water common carriers subject to the Shipping Act, 1916, as amended, or the Intercoastal Shipping Act of 1939, as amended (including persons who hold themselves out to transport goods by water but who do not own or operate vessels) engaged in the transportation of property in interstate or foreign commerce between Alaska or Hawaii on the one hand, and, on the other, the other States of the Union, and through routes and joint rates so estab-

lished and all classifications, regulations, and practices in connection therewith shall be subject to the provisions of this part."

Section 203 (a) (13) of the Interstate Commerce Act, 49 U.S.C. §303 (a) (13), provides:

> The term "motor vehicle" means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, or any combination thereof determined by the Commission, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails, or a trolley bus operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street-railway service.

Section 203 (a) (14) of the Interstate Commerce Act, 49 U.S.C. §303 (a) (14), provides:

> The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I.

Section 212 (a) of the Interstate Commerce Act, 49 U.S.C. §312 (a), provides:

> Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may,

upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license; *Provided, however,* That no such certificate, permit or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission made as provided in section 304 (c) of this title, commanding obedience to the provision of this chapter, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder***.

QUESTIONS PRESENTED

1. Must Appellant, as a motor common carrier operating under certificate of public convenience and necessity No. MC-107012 Sub 30, transport cargo from and to Alaska exclusively by highway, or is it authorized to transport such cargo part way by highway and part by water in the so-called "land-sea-land" mode?

2. Does the declaration and order of the Interstate Commerce Commission that the Sub 30 certificate does not authorize Appellant to transport cargo from and to Alaska in the so-called "land-sea-land" mode constitute a limitation, modification or revocation of such certificate without due process of law?

STATEMENT OF THE CASE

Background Of Events Leading To The Proceeding Before The Interstate Commerce Commission

Appellant is an Indiana corporation which has engaged in the transportation of household goods for more than thirty years. It presently holds certain certificates of public convenience and necessity issued by the Interstate Commerce Commission which authorize operations as a common carrier by motor vehicle in interstate or foreign commerce. Certificate No. MC-107012 (Comp. Att. A)[1] authorizes household goods service, over irregular routes, between points in the United States;[2] while certificate MC-107012 Sub 30 (Attachment A hereto), the certificate in question, authorizes —

IRREGULAR ROUTES

> *Household goods,* as defined by the Commission, between points in Alaska, on the one hand, and, on the other, points in the United States, except Alaska and Hawaii.

Appellant began transporting household goods from and to Alaska in 1953. The traffic has been moved in two separate modes: (1) the so-called "highway" mode whereby cargo is transported by land from origin to destination in

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1 The reference "Comp. Att." refers to Appellant's complaint in the District Court and the attachments thereto. The reference "Comp. Par." refers to a paragraph of the complaint. It was agreed among counsel below that the complaint and the attachments would constitute the administrative record before the District Court.

2 Certificate No. MC-107012 was issued prior to January 3, 1959. In *Interpretation of Operating Rights — Alaska,* 81 M.C.C 701 (1959), the Interstate Commerce Commission held that the words "United States", as used in such certificates, do not include the State of Alaska.

motor vehicles via the Alcan Highway and other highways in the United States and Canada; (2) the so-called "land-sea-land" mode whereby cargo is transported by land in motor vehicles over highways between inland United States points and West Coast ports (generally Seattle, Washington), over the ocean aboard ocean vessels between West Coast ports and Alaskan ports, and by land in motor vehicles over highways in Alaska.

Ocean service is performed by Appellant between West Coast ports and Alaska ports in its capacity as a "non-vessel operating common carrier by water", recognized by the Federal Maritime Commission.[3] In either mode, Appellant issues its own bills of lading, charges rates published in its own tariffs filed with the Interstate Commerce Commission, and assumes sole common carrier liability from origin to destination.

The Alaskan operations constitute a significant element of Appellant's business. For the twelve month period beginning January 1, 1966 and ending December 31, 1966, Appellant transported 339 Alaska "highway" shipments with gross revenue of $302,361.79; while for the twelve month period beginning September 1, 1965 and ending August 31, 1966, Appellant transported 638 Alaska, "land-sea-land" shipments with gross revenue of $598,315.31 (Comp. Par. V and VI).

Between 1953 and the date of Alaska's admission into the Union (1959), Appellant's highway and land-sea-land operations, insofar as conducted outside the limits of the then United States, were not subject to the Commission's certificate requirements. Accordingly, Appellant's Alaskan

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[3] *Common Carriers By Water — Status of Express Companies, Truck Lines and Other Nonvessel Carriers,* 6 F.M.B. 245.

operations were conducted without any specific authority or certificate from the Commission.

In July of 1958, the statehood status of Alaska became imminent (Public Law 85-508, July 7, 1958; see note, 48 U.S.C. preceding §21). Appellant immediately applied for and received temporary authority from the Commission pursuant to 48 U.S.C. §310a (a). (Comp. Par. VI). That authority, issued December 31, 1958 and designated as Sub-23 TA, authorized the following service:

> *Household goods,* as defined by the Commission, over irregular routes, between points in Alaska, on the one hand, and, on the other, those points in the Continental United States which applicant is presently authorized to serve*** (Comp. Att. C).

The temporary authority was subsequently extended by the Commission until October 31, 1963, when it was superseded by the permanent Sub 30 certificate as hereafter related (Comp. Par. VI).

Alaska was formally admitted into the Union on January 3, 1959 (see note, 48 U.S.C. preceding §21). On July 12, 1960, Congress adopted 49 U.S.C. §§306 (a) (4) and 306 (a) (5) which provided for application to the Commission for a permanent "grandfather" certificate to serve Alaska as a common carrier by motor vehicle. Shortly thereafter Appellant filed such an application, but a final determination was not made by the Commission until October 21, 1963 (Comp. Par. VII).

Therefore, between December 31, 1958 (the date of the temporary authority granted by the Sub 23 TA certificate) and October 1, 1963 (the date the temporary authority was superseded by the permanent authority granted by the Sub 30 certificate), Appellant continued to operate from and to Alaska in both the highway and land-sea-land modes by

virtue of the temporary authority certificate (Comp. Par. VIII).

The fact of such operations was made known to the Commission in four formal route extension proceedings in 1959 and 1960 in which Appellant appeared as a protestant and gave evidence of its Alaskan operations (Comp. Att. D. and Att. E). In one of the proceedings, Appellant's service was the source of specific comment in the Commission's formal report. In *Dean Van Lines, Inc., Extension — Alaska,* decided July 19, 1960, officially reported at 83 M.C.C. 323 (Comp. Att. E), the Commission described Appellant's Alaskan service as follows:

> North American holds certificates, issued prior to January 3, 1959, authorizing, as pertinent, the transportation of household goods between points in Alaska, on the one hand, and, on the other, points in the rest of the continental United States, including Alaska, and operates a large fleet of equipment suitable for overland transportation of household goods to and from Alaska. *While movements to and from Alaska are handled through Seattle in conjunction with connecting water or air carriers, it supplements these movements with a relatively substantial volume of overland shipments from and to Alaska through its terminal at Great Falls, Montana.* It has considerable experience in Alaskan operations and has been so engaged since 1953 (83 M.C.C. 323, 326; emphasis supplied).
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> ***
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> We are of the opinion that applicant failed to sustain its burden of proving a need for the proposed service which cannot adequately be met by existing carriers. While we recognize that evidence of the present or future need for the transportation of household goods is difficult to obtain because of the non-repetitive character of the traffic, nonetheless, some showing must be made that existing carriers cannot or are not adequately serving the public. No such showing has

been made. *Since 1953, North American has rendered in a satisfactory manner, Alaskan service through Seattle in conjunction with water or air carriers and has supplemented such service with a relatively substantial volume of overland operations through its terminal at Great Falls* (83 M.C.C. 323,326, emphasis supplied).

As a result of the disclosures, and the language of the *Dean* case, Appellant was confident that the Commission had construed the language of the Sub 23TA certificate as including both highway and land-sea-land service. Appellant concluded that otherwise its dual service would not have been described as satisfactory by the Commission; and that if the lawfulness of such service was in any way suspect or unauthorized, the Commission would have said so at that time (Comp. Par. IX).

Subsequently, on October 1, 1963, the Commission finally determined Appellant's "grandfather" application. As a result, Appellant's temporary authority under the Sub 23 TA certificate was superseded by its permanent authority under the Sub 30 certificate. The nature of the language in the Sub 30 certificate is identical in substance to that employed in the Sub 23 TA temporary authority certificate; that is, "irregular routes, between points in Alaska, on the one hand, and, on the other, points in the (continental) United States". Appellant concluded that since the Commission had indicated in the *Dean* case that the language in the Sub 23 TA temporary authority certificate authorized both highway and land-sea-land service, the similar language in the permanent Sub 30 certificate likewise authorized such dual service (Comp. Par. X).

On March 9, 1964, Appellant's authority to conduct land-sea-land operations from and to Alaska under the Sub 30 certificate was questioned by an official of the Department of Defense acting on a complaint filed by a competi-

tor. Accordingly, Appellant dispatched a telegram to the Commission's Bureau of Motor Carriers seeking an informal opinion of the scope of the Sub 30 certificate. (Comp. Att. F). The Bureau responded by stating that at least until final Commission action on the then pending *Piggyback*, case,[4] "This Bureau cannot say that continuance under your Sub-30 of the long-continued motor-water-motor operations described . . . would be objectionable" (Comp. Att. G). The telegram was signed by Herbert Qualls, Director of the Commission's Bureau of Motor Carriers.

The *Piggyback* case was decided by the Commission on March 16, 1964. Thereafter, Appellant twice submitted applications to the Commission under 49 U.S.C. §317 and the regulations thereto,[5] seeking special permission to publish provisions in its tariffs in order to continue substituting land-sea-land service for all-highway service over a portion of the through route between the continental states and Alaska. In one of the applications, Appellant made specific reference to the Commission's language in the *Dean* case (Comp. Att. H). By orders dated June 17, 1964, and April 15, 1965, the Commission's Special Permission Board granted both requests (Comp. Att. I and Att. J). Since both special permissions were granted subsequent to the Commission's decision in the *Piggyback* case, and since the above referenced telegram from Herbert Qualls indicated

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4 Officially reported by the Commission as Ex Parte 230. *Substituted Service — Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service).* 322 I.C.C. 301, review at 244 F. Supp. 935 (N.D. Ill. 1965), reviewed further *sub nom., American Trucking Ass'ns. v. Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 18 L. ed. 2d 847 (May 29, 1967).

5 The Commission's tariff regulations governing special permission applications were formerly designed as 49 C.F.R. 287.6. Effective December 20, 1967 (32 C.F.R. 2003) the regulations were redesignated as 49 C.F.R. 1307.6.

that the decision in that case was the only potential obstacle to continuation of land-sea-land service under the Sub 30 certificate, Appellant concluded that its right to conduct *both* highway and land-sea-land service under the certificate had once again been affirmed by the Commission (Comp. Par. XII).

As of early 1966, therefore, Appellant confidently construed the language of its sub 30 certificate as authorizing both highway and land-sea-land operations; or at least as authorizing the substitution of land-sea-land service for highway service pursuant to appropriate special permission applications and substitute service tariff provisions. Its conclusion was based on the clear language on the face of the Sub 30 certificate itself; and in reliance on the events heretofore related, that is, (1) that no member of the Commission or any of its staff had ever formally or informally questioned Appellant's land-sea-land service despite the fact that such service had been disclosed to the Commission on several occasions, (2) the decision of the Commission in the *Dean* case, (3) the opinion of Herbert Qualls for the Commission's Bureau of Motor Carriers, and (4) the substitute service tariff approvals of the Commission's Special Permission Board following the so-called *Piggyback* case (Comp. Par. XIII).

On March 1, 1966, however, Appellant received a letter from George A. Meyer, Director of the Commission's Bureau of Operations and Compliance. He stated that in his opinion land-sea-land service was not authorized under the language of Appellant's Sub 30 certificate, and that in order to continue rendering such service, some other type of authority would be required (Comp. Att. K). Since that opinion was in direct contravention of all of the prior formal and informal opinions of the Commission and its staff, Appellant found it necessary to take appropriate action in

order to terminate the controversy and to remove the resulting uncertainty (Comp. Par. XIV and Par. XV).

Proceedings Before The Commission

On June 20, 1966, Appellant filed a petition with the Commission seeking a declaratory order holding that the Sub 30 certificate authorizes land-sea-land service as well as highway service from and to Alaska; or, in the alternative, requesting that the Sub 30 certificate be modified to include whatever language was deemed appropriate to authorize both land-sea-land and highway service (Comp. Att. O). Smyth Overseas Van Lines, Inc., Alaska Van & Storage Co., Inc., and Air Van Lines, Inc., intervened in opposition to Appellant's petition (Comp. Par. XV and Par. XVI).

By order dater October 6, 1966, Division 1 of the Commission denied the petition (Appendix B hereto). Appellant filed a petition for reconsideration, but that petition was denied by the Commission on March 7, 1967 (Comp. Att. R.).

Proceedings In The Court Below

Having exhausted its administrative remedies, Appellant filed its complaint to the three-judge court seeking to have the Commission's order set aside. Appellant urged that the Commission's interpretation of the Sub 30 certificate as authorizing highway service only was arbitrary, capricious and in contravention of the plain language of the certificate; and, that the action of the Commission constituted a limitation, modification or revocation of Appellant's certificate in violation of 49 U.S.C. §312 (a) and without due process of law.

The court denied the relief requested (Attachment C hereto). Appellant thereupon instituted this appeal.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

The Decision Erroneously Requires Appellant To Transport Cargo Exclusively By Road

A principal concern of this appeal is whether a carrier which holds a certificate of public convenience and necessity authorizing operations by motor vehicle, over irregular routes, from and to Alaska, must confine itself to transportation of cargo exclusively by road, even though such a restriction does not appear on the face of the certificate. This Court has never reviewed the specific question,[6] but its recent comments concerning the general scope of a motor carrier franchise indicate that such a carrier is not so limited in its operations.

Elementary to the question is an appreciation of the unique geographic relation of Alaska to the 48 continental states. Whereas the continental states are physically connected by common boundaries, thereby affording a surface carrier a wide choice of possible routes for transporting cargo from one state to another, the geographic cleavage

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6 This Court did review *Andrews Van Lines, Inc. v. United States*, 240 F. Supp. 763 (D.C. Nebr. 1965), aff'd. *per curiam*, 382 U. S. 67 (1965), and *Aero Mayflower Transit Co., Inc. v. United States*, Civil No. IP 64-6-605 (S.D. Ind. 1966), aff'd. *per curium*, 387 U.S. 90 (1967). Those decisions expressed the proposition that a motor carrier could not prove that it had conducted highway operations in an Alaska "grandfather" proceeding by proof of past service by water only. The decisions did not touch the issue presented here, that is, once an irregular route motor carrier certificate is granted to serve Alaska without restrictions as to routes, is it to be interpreted as restricted to transportation by highway only. Furthermore, the decisions were based on the exclusive jurisdiction of the Federal Maritime Commission over water routes from and to Alaska as it existed in 1961. See *Andrews*, 240 F. Supp. 763, at 767-768. As shown later herein, that jurisdiction was transferred to the Interstate Commerce Commission on August 24, 1962 under the provision of §216(c) of the Interstate Commerce Act.

which separates those states from their sister state to the North confines such a carrier to a choice of only two alternative routes from and to Alaska. It may either endure the wild uncertainties of an all-highway trip over the Canadian portion of the Alcan Highway, or it may combine highway and ocean routes via port cities in the continental states and in Alaska. There are no other choices.

Shortly after Alaska's admission to the Union, the geographic realities were recognized by Congress. Effective July 12, 1960,[7] it amended §203 (a). (10) of the Interstate Commerce Act to provide for Commission regulation of rates, fares, charges, and practices of surface carriers incident to the all-highway route through Canada. Therefore, no one controverts that such service is authorized under Appellant's Sub 30 certificate.

Effective August 24, 1962,[8] Congress also amended §216 (c) of the Act to provide for Commission jurisdiction over all classifications, regulations and practices pertaining to the service of surface carriers over the land-sea-land route. That section permits motor common carriers to enter into joint rates and thru routes with other carriers, including non-vessel ocean carriers, for the transportation of cargo from and to Alaska. The *entire* service is made subject to the jurisdiction of the Interstate Commerce Commission. The legislation was enacted to provide shippers in the Alaskan trade with the benefits of one carrier responsibility and single-factor rates on traffic moving by motor and water.[9]

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[7] Section 3, Public Law 86-615, 86th Congress, 2d Session, approved July 12, 1960, 74 Stat. 384.

[8] Section 1, Public Law 87-595, 87th Congress, 2d Session, approved August 24, 1962, 76 Stat. 397.

[9] Senate Report No. 1799 (Aug. 1, 1962), U. S. Code Congressional and Administrative News, p. 2160 et seq. See particularly, pp. 2161-2162.

Appellant conducts land-sea-land operations under its Sub 30 certificate in harmony with that section. It has entered into joint rate and thru route tariffs, with itself as a non-vessel ocean carrier. Those traiffs, and the entire service thereunder, have twice been approved by the Commission in formal special permission tariff proceedings. In essence, Appellant substitutes ocean service for highway service over a portion of the through route.

While the Commission agrees that the Sub 30 certificate permits all-highway operations through Canada, it has declared that the certificate does not authorize service or substitution of service over the land-sea-land route. The District Court ascribes two reasons for that view: (1) the certificate is limited to operations by "motor vehicle", which words it interprets as confining a motor carrier to transportation of cargo exclusively by "highways", and, (2) the record in the "grandfather" proceeding which gave birth to the Sub 30 certificate indicates that land-sea-land service was not meant to be embraced thereunder. Both propositions are based on interpretations or interpretive processes which contravene principles of law established by this Court.

A. The Decision Misconstrues The Plain Meaning Of The Language In The Certificate, Particularly The Words, "By Motor Vehicle"

The basic consideration here is interpretation of the words in the Sub 30 certificate. Appellant concedes the general proposition that the Commission's interpretation of a Certificate is not to be disturbed by the courts unless it is arbitrary, capricious, or does violence to some established principle of law. The reasoning is that the Commission's

interpretation is entitled to special weight where it is based upon its accumulated knowledge and experience.

On the other hand, the plain meaning of words in a certificate is controlling in the absence of patent ambiguity. *Andrew G. Nelson v. United States,* 355 U.S. 554, at 557 (1958). Under those circumstances, no special weight should be attached to the Commission's interpretation since all that is required is to give ordinary and accepted meaning to the language of the certificate.

There is nothing patently ambiguous in the language in the Sub 30 certificate. It authorizes service (a) *over irregular routes,* (b) *between the continental United States, on the one hand, and, on the other, points in Alaska,* (c) *by motor vehicle.*

Absent a specific route restriction, an *irregular route* authority permits operations over any route or combination of routes, between the points specified in the certificate. Compare *Brady Transfer & Storage Co., Extension — Wisconsin,* 51 M.C.C. 770, at 774 (1950). In that regard, it is noteworthy that there is no specific route restriction in Appellant's Sub 30 certificate. Neither the highway nor the land-sea-land routes are specifically included or excluded. The certificate simply states that service is authorized over "irregular routes".

Likewise, words of geographic limitation, such as *between* (points in Alaska), *on the one hand, and,* (points in the continental states) *on the other,* have a well-established meaning. They are words ordinarily used in certificates to permit operations to originate at one base point and to be carried on to a destination at the other base point. Compare *Jack Cole Co., Inc., Common Carrier Application,* 32 M.C.C. 199, at 199, 208-209 (1942).

The Commission and the District Court seem to have no quarrel with the plain meaning of those two phrases as used in the Sub 30 certificates. It is the words *by motor vehicle* which cause them to restrict the certificate against land-sea-land operations. The District Court stated that since a common carrier "by motor vehicle" is defined in §§203 (a) (13) and 203 (a) (14) of the Interstate Commerce Act as a carrier which operates by means of the highway, the Sub 30 certificate can only authorize routes which embrace transportation exclusively by road, i.e., the all-highway route.[10]

The effect of that interpretation is to require Appellant, and all other motor carriers similarly situated, to conduct operations from and to Alaska exclusively by road. No other choice of routes or service is available, including the opportunity to substitute ocean service for highway service over a portion of the through route.

This Court recently commented, however, that the meaning of the words *by motor vehicle* is not so restrictive. In *American Trucking Ass'ns. v. Atchison, Topeka & Santa*

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10 Appendix C, page 10c. This Court's attention is directed to that portion of the Commission's order (Appendix B, page 2b) which indicates that Appellant must possess additional authority, which would read "between points in Alaska", in order to lawfully render land-sea-land service. Apparently the Commission considers that such a certificate could be tacked or combined with Appellant's existing authority "between points in the United States" to render a through service. Considering the Commission's decision in *Willett Pipe Line Stringing Corp. Ext. — Alaska*, 92 M.C.C. 41 (1963), its position poses an anomaly. In the *Willett* case the Commission found that authority "between points in Alaska" could not be tacked or combined with authority "between points in the contiguous 48 states" for purpose of providing a through service, because there is no point of joinder which is common geographically to the two separate authorities. *Willett*, at pp. 45-46. Therefore, Appellant's remedy, as proposed by the Commission, would be unavailing.

Fe Ry.,[11] the authority of the Interstate Commerce Commission to promulgate trailer-on-flatcar, or so-called "piggyback" rules, was at issue. During the course of the proceeding, certain parties contended that motor carriers cannot perform or substitute service by rail since transportation by road is the exclusive basis of their franchise.[12] This Court stated otherwise, however, at 18 L. ed. 2d. 859:

> The Interstate Commerce Act defines a "common carrier by motor vehicle" as "any person which holds itself out to the general public to engage . . . in transportation by motor vehicle." *This does not exclude joint arrangement with water carriers or rail carriers which are expressly permitted by section 216 (c) on a voluntary basis,* and according to the appellant's and the District Court, it is not inconsistent with the use of open-tariff TOFC if the railroad is willing. Clearly, to, a trucker which utilizes a ferry to transport his trailer and its cargo is not violating the statute or his certificate. *We may properly assume, therefore, that the Act cannot be construed to require that the trucker must always transport its cargo exclusively by road"* (Emphasis supplied).

There is nothing therefore in the language of Appellant's Sub 30 certificate which confines its Alaska operation to transportation exclusively by road. The words *by motor vehicle* do not prohibit Appellant from entering into an arrangement under §216 (c), as it does, to provide land-sea-land service as a substitute for all-highway service over a portion of the through route. To hold otherwise would impose a *regular route* restriction in the certificate, as contrasted with the existing *irregular route* language; and it would emasculate the Congressional intent of §§203 (a) (10) and 216 (c) to overcome the barriers of geography by

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11 Full citation at footnote 4 herein.

12 18 L. ed. 2d 847, at 858.

providing, under the jurisdiction of the Interstate Commerce Commission, for one responsibility, single-factor service from and to Alaska, whether by highway, or by a combination of water and highway.

The District Court interpreted the words *by motor vehicle* contrary to their meaning as heretofore found by this Court.

B. The Decision Is Based On Extraneous Matters, Contrary To Lawful Interpretive Processes

As an additional reason for holding that Appellant's Sub 30 certificate does not authorize land-sea-land service, the Commission and the District Court looked behind the certificate to the "grandfather" proceeding out of which it was issued. They concluded that land-sea-land service was not intended to be authorized in that proceeding; and therefore, it is not embraced in the Sub 30 certificate.[13] Appellant disputes that finding, but as argued hereafter, whatever the facts of the "grandfather" case, they are irrelevant.

The interpretive process followed by the Commission and the District Court violates a fundamental rule of certificate construction. "Absent patent ambiguity, it is well established that the Commission will not refer to the underlying grandfather operation." *Andrew G. Nelson v. United States, supra,* at 557 (footnote 3). More recently, the rule was elaborated at length in *T. I. McCormack Trucking Co., Inc. v. United States,* 251 F. Supp. 526 (D.C.

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[13] Appendix B, page 3b; Appendix C, pages 10c-11c. The District Court noted: "North American's certificate cannot be interpreted apart from the historical background which gives rise to it." This is the heart of the District Court's error.

N.J. 1966). After citing the *Andrew G. Nelson* case, the district court commented (at 530):

> One cardinal rule is that the certificate must speak for itself. In the absence of patent ambiguity the Commission refuses to consider extraneous matters, including the record which gave birth to the certificate in question. And this rule is followed regardless of whether the practical result is to confer upon the carrier more or less authority than may have been intended to be granted originally *** Moreover, the Commission has consistently held that a validly issued certificate may authorize transportation not contemplated at the time is was granted *** and services within a larger territory than was intended *** As pointed out by the Commission in *Manhattan Coach Lines, Inc. v. Adirondack Transit Lines, Inc.*, 42 M.C.C. 123, 126, *any other rule would contribute an intolerable uncertainty to the finality of any right granted.*" (Italics by the district court).

There is no patent ambiguity in the language of the Sub 30 certificate. As indicated above, all of the pertinent language has well accepted meaning. In fact, nowhere in the decisions of the Commission or of the District Court is there one thought that either tribunal found the language uncertain or ambiguous.

It is therefore contrary to law for the Commission and the District Court to refer to the record and decision in Appellant's "grandfather" proceeding in order to interpret the Sub 30 certificate. In cases, as here, where there is an absence of patent ambiguity, the interpretive process does not include a determination of what was intended in the underlying proceeding, or what the carrier proved therein, or even how the carrier actually operates today. The only question is, what do the plain words of the certificate mean

and what do they authorize? Whether they mean more or less than was intended is irrelevant.

It is error for the Commission and the District Court to read restrictive language into the Sub 30 certificate and to interpret the certificate as requiring Appellant to operate by highway only.

II.

The Action Of The Interstate Commerce Commission Constitutes A Partial Revocation Of Appellant's Certificate Without Due Process Of Law

A certificate of public convenience and necessity, such as Appellant's Sub 30 certificate, is property of value entitled to constitutional protection. *Movers Conference of America v. United States,* 205 F. Supp. 82, at 84 (S.D. Calif. 1962).

The Interstate Commerce Commission is empowered to limit, modify or revoke an existing certificate only after resort to the formal notice and hearing procedures of §212 (a) of the Interstate Commerce Act. Failure to do so constitutes a taking of property without due process of law. *Movers Conference,* at 86.

Appellant recognizes that a distinction is sometimes made between action by the Commission which constitutes a revocation of a certificate and that which simply amounts to interpretation of operating authority. Since the latter is lawful without resort to §212 (a), the task of a reviewing court is to determine the character of the Commission's action. Does it constitute a revocation of authority or is it merely interpretive of pre-existing rights? Compare, *De*

Camp Bus Lines v. United States, (D.C. N.J. 1963), 15 CCH Fed. Car. Cases ¶81,577.[14]

The Court below found that the Commission's action does not constitute a partial revocation of Appellant's Sub 30 certificate. By reference to the record and decision in Appellant's "grandfather" proceeding, the Court concluded that the Commission merely "interpreted" the authority as never being intended to embrace land-sea-land service in the first place.[15]

But as heretofore argued, the District Court erred by permitting the Commission to indulge in an interpretive impropriety. In the case of an unambiguous certificate, reference to secondary sources is "but a thinly veiled violation of the protection allowed existent and operating authority by 49 U.S.C. §312 (a)." *Parkhill Truck Company v. United States,* 240 F. Supp. 842, at 845 (D.C. Okla. 1965). It is clearly established that the Commission is not empowered to revoke a certificate under the guise of interpretation. *Andrew G. Nelson, Inc. v. United States, supra,* at 558 (footnote 4).

Appellant urges further, however, that even if reference to secondary sources is permitted, the Commission's action still cannot be considered as mere "interpretation", in view of the history of its conduct and attitude toward Appellant's land-sea-land operations. While estoppel or reliance may not be appropriate labels, Appellant contends that the

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14 "Thus, it must be determined whether the Commission's action is an interpretation or construction of the scope of [Plaintiff's] certificates, or, on the other hand, a modification, change, or revocation of the same. If the Commission's action is determined to be a modification, change, or revocation (either wholly or partially) of [Plaintiff's] certificates, it is unlawful and must be set aside for the procedure prescribed in Section 212 was not pursued."

15 Appendix C, page 9c.

law is or ought to be that when the Commission, by its acts and omissions, causes the meaning of a certificate to be long understood and accepted as embracing a particular kind of service, it cannot later, by "interpretation", restrict the certificate against that service without resort to §212 (a) of the Act. To do otherwise constitutes a denial of due process.

Appellant can find no Supreme Court decision which reaches this particular issue. It suggests, however, that this Court should adopt the rationale of *Movers Conference of America v. United States, supra,* as being applicable here.

In the *Movers Conference* case the Commission had known for years that motor carriers which held household goods certificates were performing moves which did not necessarily involve the change of abode of a householder. Despite its knowledge, it had never attempted to prosecute any mover for operating in that fashion. Subsequently, the Commission adopted a rule which "interpreted" a household goods certificate as only embracing moves which involve a change of abode.

The movers challenged the rule in the federal district court on the ground that it deprived them of property rights under their certificates. The Commission argued, as it does here, that the change of abode rule was always intended to be part of the household goods definition; and it cited previous cases which it claimed warned the movers of that proposition and which dispelled any notion that it had acquiesced to any other construction.

The court did not agree with the Commission, however. It said that since the Commission was fully aware of the past practices of the movers and yet had undertaken no action to prevent the activity, it had, in effect, "acquiesced" in the broad definition of household goods as previously understood by the movers. The court concluded that the

Commission's proposed interpretive rule redefined household goods in a manner different from the existing definition commonly accepted within the industry. Since it did so in a manner other than as prescribed in §212 (a), it deprived the carriers of property rights without due process of law.

Appellant contends that its facts are equivalent, at least in their effect and consequence, to those in the *Movers Conference* case. They are related in detail earlier herein. In summary, (1) Appellant operated in land-sea-land service from 1953 to late 1958 without the need for a certificate, (b) in 1958 it was granted temporary authority in Sub 23TA to operate between points in Alaska, on the one hand, and, on the other, points in the continental United States, (c) during 1959 and 1960 it participated in four Commission proceedings which involved disclosure of its Alaska land-sea-land operation, (d) in one of the proceedings (the *Dean* case), the Commission denied a competitive application because of the adequacy of Appellant's service, (e) in 1963 Appellant was granted its permanent Sub 30 certificate which read substantially the same as its Sub 23TA certificate, (f) in 1964 Appellant was advised by the Commission's Bureau of Motor Carriers that continuance of its land-sea-land operations was not objectionable, (g) in 1964 and 1965 the Commission's Special Permissions Board approved Appellant's request to file substitute service land-sea-land tariffs, (h) during the entire time involved (1953-1965) the Commission never attempted, formally or informally, to require Appellant to cease operations even though the Commission was well aware they were being conducted.

The District Court found that such a course of dealing between the Commission and Appellant's land-sea-land service could not be characterized as revocation of the Sub 30

certificate. Appellant urges that the District Court confused the trees with the forest. It rejected each isolated instance as being non-persuasive of acquiescense, but it failed to account for their cumulative effect. It may be that each instance, standing alone, would not amount to acquiescence. Their combined force, however, produces the same climate as the *Movers Conference* case.

Appellant was led to believe that it could conduct land-sea-land operations and it acted on that belief. The Commission was fully aware of Appellant's belief, and nothing it ever did was calculated to inform Appellant that its understanding was in error. To the contrary, the Commission's overt acts time and again fostered the belief and bolstered Appellant's understanding.

The Commission should not be permitted to induce a long accepted understanding of the scope of a franchise, and then suddenly restrict the franchise in a proceeding other than that prescribed by law. To hold otherwise would frustrate the certainty and continuity essential to an extensively regulated industry, and would leave unprotected those legitimate carrier expectations based on Commission action.

This Court is therefore asked to hold that the Commission has restricted Appellant's Sub 30 certificate in a manner contrary to its meaning as understood and accepted for years by Appellant and by the Commission; and that such action, not being pursuant to §212(a) of the Interstate Commerce Act, unlawfully deprives Appellant of property without due process of law.

CONCLUSION

Appellant poses two questions not yet resolved by this Court: (1) Is a motor carrier franchise to serve Alaska over irregular routes confined exclusively to transportation by highway? (2) May the Commission, by its overt acts and by its silence, induce an understanding of the scope of a franchise and permit a carrier to operate for a substantial length of time with that understanding, and subsequently rule that the franchise is more restrictive, without resort to the procedures of §212 (a) of the Interstate Commerce Act? Appellant contends that the District Court erred in its consideration of both questions. Those errors substantially affect Appellant's interest and it is respectfully prayed that they are of such significance as to warrant plenary consideration by this Court.

Respectfully submitted,

MARTIN A. WEISSERT
P. O. Box 988
Fort Wayne, Indiana

Attorney for Appellant

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